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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of :
Miriam Fields-Babineau :
Serial No.: 09/736,408 : Art Unit: 3644
Filed: December 15, 2000 : Examiner: Smith, Kimberly
For: COMFORT TRAINER : Atty Docket: 4523-001
("CANINE HEAD HALTER") : (MFB-0001)
:

APPELLANT'S APPEAL BRIEF UNDER 37 C.F.R. §1.192

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Under 37 C.F.R. §1.192, Applicant submits this Appeal Brief,
SUMMARY OF EXHIBITS SHEET, and Exhibits in triplicate, together
with the required fee.

1. REAL PARTY IN INTEREST

The real party in interest is Miriam Fields-Babineau.

2. RELATED APPEALS AND INTERFERENCES

On April 13, 2004, Applicant filed a Petition to the
Director Under 1.181 requesting withdrawal of the finality of the

Office Action dated November 20, 2003 as being premature.¹ The Petition remains pending.

There are no other appeals or interferences that will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

3. STATUS OF CLAIMS

Claims 1-5 stand cancelled by way of the Amendment dated August 8, 2002. Claims 1-5 are not appealed.

Claims 6-25 stand amended way of the Amendment dated March 10, 2003.

Claims 6-25 are appealed.

4. STATUS OF AMENDMENTS

Amendments prior to and including March 10, 2003 have been entered.

The After Final Amendment of February 20, 2004 has not been entered. That Amendment was filed in response to the suggestion of Examiner Poon -- who attended the Examiner Interview of December 9, 2003, but is not a signatory in this case.

¹Prosecution was re-opened **after** filing of the first Appeal Brief, resulting in a final action, without an intervening Amendment from the Applicant. The subject appealed claims are **identical** to those of the first Appeal Brief.

Concurrently herewith, the Applicant has filed an AMENDMENT UNDER 37 C.F.R. § 116 cancelling claims 10 and 25 for purposes of simplifying the issues for purposes of Appeal.

5. SUMMARY OF INVENTION

The present invention relates to the art of canine head halters. The Applicant has written the book *Dog Training with a Head Halter*, which has been made of record in this application and considered by the Examiner in the Office Action dated May 8, 2002. The first four pages of this book are attached hereto as EXHIBIT A. Pages 1-3 provide photographs and descriptions of five ("5") other commercial head halters, while page 4 provides a photograph and description of the present invention.

Claim 6 is illustrative of the present invention and particularly reads on FIG. 1 (illustrating dog halter 10 without dog) and FIG. 2 (illustrating dog halter 10 with dog).

CLAIM 6. A canine head halter (10; pg. 5, ln. 2), comprising:

a collar member (30; pg. 5, ln. 9) configured and arranged to encircle a canine neck behind the ears and below the chin, said collar member (30; pg. 5, ln. 9) including a top strap (60; added to pg. 5, ln. 10) respectively connected at first and second ends thereof to first (32; pg. 5, ln. 13) and second (34; pg. 5, ln. 12) metal collar rings, and a bottom strap (64; pg. 5, ln. 15) respectively connected at first and second ends thereof to the first (32; pg. 5, ln. 13) and second (34; pg. 5, ln. 12) collar rings to thereby form a continuous loop;

a snout loop (11; added to pg. 5, ln. 3) configured and arranged to encircle the canine snout including a single lofted upper nose member (12; pg. 5, ln. 5) respectively connected at first and second ends thereof to first (14; pg. 5, ln. 4) and second (16; pg. 5, ln. 4) metal snout loop rings, and an under chin member (20; pg. 5, ln. 8) respectively connected at first and second ends thereof to the first (14; pg. 5, ln. 4) and second (16; pg. 5, ln. 4) snout loop rings to thereby form a continuous loop;

a first cheek strap (52; pg. 5, ln. 13) connecting the first collar ring (32; pg. 5, ln. 15) to the first snout loop ring (14; pg. 5, ln. 4);

a second cheek strap (50; pg. 5, ln. 12) connecting the second collar ring (34; pg. 5, ln. 12) to the second snout loop ring (16; pg. 5, ln. 12); and

an under chin strap (66; pg. 5, ln. 16) connected at a first end to the bottom strap (64; pg. 5, ln. 16) of said collar member (30; pg. 5, ln. 9) and connected at a second end to a metal cinch ring (22; pg. 5, ln. 8), wherein a portion of the under chin member (66; pg. 5, ln. 16) of said snout loop (11; added to pg. 5, ln. 3) is drawn through the cinch ring (22; pg. 5, ln. 8) for attachment to a dog leash (40; pg. 6, ln. 7).

6. ISSUES

A. Whether an Examiner may maintain a ***prima facie*** obviousness rejection by relying on case law that is not cited in the M.P.E.P. 8th Edition, Rev. 2, May 2004. Applicant contends that reliance on *Howard v. Detroit Stove Works*, 150 U.S. 164 (1893) is a violation of the Administrative Procedure Act as arbitrary and capricious, and therefore cannot support a ***prima facie*** obviousness rejection as a matter of law.

B. Whether as a matter of claim construction and applicable law, the Examiner is entitled to reconfigure structural features of the prior art in a manner neither taught nor suggested. Applicant submits that the obviousness rejection of claims 7-10 and 15 are based on an improper substitution of features without the required motivation.

C. Whether the Applicant is entitled to coin the term ***lofted*** in accordance with the dictionary definition to non-obviously define over the prior art. Applicant submits that claim 6 is non-obvious over the prior art due to definition of a "single lofted upper nose member."

D. Whether substitution of metal rings for rubber rings is obvious in view of a Declaration by Alice DeGroot, the very

inventor of a reference relied upon by the Examiner. Applicant claims metal rings, which were specifically considered and then rejected by DeGroot, U.S. Patent No. 4,483,275. Applicant submits that claims 6, 12, 14, 16, 17-20 setting forth metal rings, and claim 24 setting forth the rotatable ring function are non-obvious in view of the prior art.

E. Whether the claimed "spaces defined by the weaves of the woven fabric" (which are inherently locked) in claims 22-24 are taught by Tachi, et al., U.S. Patent No. 4,798,174, col. 1, ln. 49-52 which states "... holes ... composed of a gap or space formed between a pair of chain stitches not interlocking with each other ..." to support an obviousness rejection.

F. Whether the combined Declaration of Eric Udler demonstrating commercial success, in combination with the evidence of lack of utility of the prior art embodiments to Borchelt (I-IV), and in combination with claimed limitations are sufficient to overcome the obviousness rejections of record.

7. GROUPING OF THE CLAIMS

- I. Claim 6 stands alone.
- II. Claims 7-11, and 13 stand together.
- III. Claims 12, 14, 16 and 21 stand together.
- IV. Claim 15 stands alone.
- V. Claim 17 stands alone.
- VI. Claims 18-20 stand together.
- VII. Claim 22 and 25 stand together.
- VIII. Claim 23 stands alone.
- IX. Claim 24 stands alone.

8. ARGUMENT

BACKGROUND

The Applicant is a world renown dog trainer having degrees in Psychology and Zoology, 25 years of experience training dogs, countless published books and articles to her credit, and an eighty page full color book dedicated exclusively to the subject matter at issue, namely canine head halters.

The Applicant was well aware of the primary art of record before the subject application was filed. Five ("5") commercial embodiments of canine head halters, including the primary art of record, have been tested and evaluated by the Applicant. Photographs and written descriptions of these five ("5") head halters are illustrated and described by the Applicant in her

published book *Dog Training with a Head Halter* -- which is of record in this case. The first four book pages are attached for convenience of the Board as EXHIBIT A.

The Borchelt art relied upon by the Examiner was not only known to the Applicant, but was evaluated and tested by her prior to development of her invention. There are a total of four ("4") Borchelt references in this application. These four references are:

- I. Borchelt, U.S. Patent No. 5,992,352 ("Borchelt I") from Paper 4.
- II. Snoot Loop Halter for Dogs ("Borchelt II") from IDS of 05/22/2001 (listed in IDS as "Peter L. Borchelt, Ph.D., Animal Behavior Consultants, www.animalbehavior.com.").
- III. Snoot Loop order form ("Borchelt III") from IDS of 05/22/2001 (listed in IDS as "Peter L. Borchelt, Ph.D., Animal Behavior Consultants, "Snoot Loop Halter for Dogs" order form").
- IV. Snoot Loop Halter for Dogs ("Borchelt IV") from IDS of 08/26/2002 (listed in IDS as "Borchelt, Peter L., PhD, SNOOT LOOP HALTER FOR DOGS, August 2001, pp. 1-6.") (courtesy copy is submitted as EXHIBIT B).

The Borchelt art is commercially sold as THE SNOOT LOOP and is discussed on page 3 of Applicant's book. See, EXHIBIT A, pg. 3.

Further, evidence of record suggests that the primary art relied upon by the Examiner, namely the art to Borchelt (I-IV) failed to the point of tragedy. As reported in the New York Law Journal, December 8, 2000 (attached as EXHIBIT C), a pit bull

under the control of Mr. Borchelt viciously attacked the groin of an innocent bystander causing irreparable injury.

ISSUE A

Whether an Examiner may maintain a *prima facie* obviousness rejection by relying on case law that is not cited in the M.P.E.P. 8th Edition, Rev. 2, May 2004. Applicant contends that reliance on *Howard v. Detroit Stove Works*, 150 U.S. 164 (1893) is arbitrary and capricious and therefore cannot support a *prima facie* obviousness rejection as a matter of law.

Claims 7-10 and 15 stand rejected in the Office Action dated November 20, 2004 under 35 U.S.C. § 103(a) as obvious over Borchelt et al., U.S. Patent No. 5,992,352 (**BORCHELT I**) in combination with "Snoot Loop Halter for Dogs by Peter Borchelt" (**BORCHELT IV**) (EXHIBIT B). The Office Action dated April 27, 2004, page 4, clarifies that the legal basis for combination is *Howard v. Detroit Stove Works*, 150 U.S. 164 (1893).

This legal basis is **not** set forth in the M.P.E.P. 8th Edition, Rev. 2, dated May 2004. Applicant attaches herewith as EXHIBIT D the relevant page A-25, where such decision would appear if it reflected current Office Policy.

It is a fundamental tenant that all applicants before the U.S. Patent and Trademark Office be accorded due process and be treated equally under the law. Moreover, *Dickinson v. Zurko*, 527

U.S. 150 (1999) confirmed application of the Administrative Procedure Act, 5 U.S.C. § 706, to the U.S. Patent and Trademark Office. A reviewing court shall-- ... (2) hold unlawful and set aside agency actions, findings, and conclusions found to be-- (A) arbitrary, capricious, [or] an abuse of discretion ..." Zurko at 152.

Accordingly, the Applicant respectfully submits that when an Examiner searches outside of the M.P.E.P. for authority to justify a legal position, such action is *per se* arbitrary and capricious because the Applicant is not treated the same as every other applicant. The Examiner could have simply cited the relevant section of M.P.E.P., applied *Graham v. John Deer*, cited an official USPTO Examination Guideline, or a published Board opinion. Moreover, the Applicant respectfully contends that *Howard v. Detroit Stove Works* was overruled by the 1952 Patent Act, which states:

"Patentability shall not be negated by the manner in which the invention was made." 66 Stat. 798 (codified as amended at 35 U.S.C. § 103(a)).

Thus, the Applicant disagrees with the legal contention advanced by the Examiner that the manner of combining two previous inventions into a single invention is *per se* negated as obvious. It is respectfully noted that *Howard* has not been cited by the Federal Circuit or the Board in a published opinion.

Withdrawal of the obviousness rejection of claims 7-10 and 15 based on *Howard* is requested.

ISSUE B

Whether as a matter of claim construction and applicable law, the Examiner is entitled to reconfigure structural features of the prior art in a manner neither taught nor suggested.

Claims 7-10 and 15 stand rejected under 35 U.S.C. § 103(a) because it would be obvious

"to have the upper nose loop to be non-flat ... as disclosed by the 'close fitting tube' of Borchelt [Borchelt IV] [EXHIBIT C]" See Office Action of November 20, 2003, page 3, ln. 23-24.

The Applicant respectfully submits that the Examiner has failed to maintain a **prima facie** case of obviousness for want of motivation for the substitution.

The Manual of Patent Examining Procedure (M.P.E.P.) § 2142 provides the proper rule to maintain a **prima facie** case of obviousness:

MPEP § 2142
ESTABLISHING A PRIMA FACIE CASE OF OBVIOUSNESS

To establish a **prima facie** case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim

limitations. The **teaching or suggestion** to make the claimed combination and the reasonable expectation of success **must both be found in the prior art**, and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

The Examiner has failed to make a **prima facie** case of obviousness because there is no teaching in the prior art to make the combination as suggested by the Examiner. On the contrary, the art itself has an express teaching away from combination.

Borchelt IV (EXHIBIT B) teaches that a structural member must be used for the portion above the canine snout -- and with good reason. This is a dog collar. The only non-flat member disclosed in **Borchelt IV** (EXHIBIT B) is a piece of felt sewn into a tube to reduce irritation to the dog.

First, there is simply no required motivation in accordance with M.P.E.P. § 2142 or *In re Vaeck* to suggest the substitution. It is respectfully submitted that the prior art use of a structural member (flat cord) in combination with a felt loop is an express teaching away from ~~combination~~^{substitution}. Thus, the Examiner has failed to make a **prima facie** case.

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Second, one could not substitute a felt tube as a structural member in a dog collar because there is no expectation of success as required by M.P.E.P. § 2142. The evidence of record indicates that strong structural members should be used in dog collars. As reported in the New York Law Journal, December 8, 2000 (EXHIBIT

C), a pit bull under the control of Mr. Borchelt himself viciously attacked the groin of an innocent bystander causing irreparable injury. It is notoriously well known that felt is easily prone to tearing. One skilled in the art would simply not make structural elements of a dog collar out of such material, for to do so would result in failure. There is a want of motivation to make such a substitution and furthermore to do so would produce an inoperable device (i.e. one lacking in utility for the purpose of restraining and guiding a dog).

FIG. 1 of Borchelt ('352) (**Borchelt I**) clearly illustrates that **all** fabric components, and in particular the nose strap 50, are made from **flat braided fabric**.

"[C]laim language is given the ordinary meaning of the words in the normal usage of the **field of the invention**." Moba, B.V. v. Diamond Automation, Inc., 2003 U.S. App. LEXIS 6285, 9 (Fed. Cir. April 1, 2003) (emphasis added) (citing Toro Co. v. White Consol. Indus., 199 F.3d 1295, 1299, 53 USPQ2d 1065, 1067 (Fed. Cir. 1999)). See also Multiform Desiccants, Inc. v. Medzam, Ltd., 133 F.3d 1473, 1477, 45 U.S.P.Q.2D 1429, 1432 (Fed. Cir. 1998) ("It is the person of ordinary skill in the field of the invention through whose eyes the claims are construed. Such person is deemed to read the words used in the patent documents with an understanding of their meaning in the field, and to have knowledge of any special meaning and usage in the field.").

The Applicant uses flat, hollow braided nylon for many of the pieces of the subject invention, such as left cheek strap 50, under chin strap 66, under nose member 20, and top strap 60. See, e.g. Applicant's specification as filed at page 3, ln. 22-23, and figure 1. However, Applicant particularly distinguishes that "...the nose area ... utilizes a soft cotton/nylon braid in a cylindrical shape..." See Applicant's specification at page 3, ln. 10-11. Further, upper nose member 50 is described as "lofted, nylon drawn cord (soft cotton nylon braid)." See, e.g. Applicant's specification as filed at page 3, ln. 23-24.

Persons experienced in the field of the invention, namely the manufacture of canine restraining devices and the like, recognize the term of art "flat" to describe a particular type of cord.

EXHIBIT E is a photographic copy of The Thomas Register 1999, pg. 10976, section CORDAGE BRAIDED, particularly illustrating that "flat braids" are a particular style of cord used in the art.

EXHIBIT F is a photographic copy of The Thomas Register 1999, pg. 10930, section CORD: DOG LEASH, particularly illustrating that "flat braids" and "flat elastic" are particular styles of cord used in the art.

Clearly one skilled in the art would use a type of cord, such as flat braid cord, in the construction of dog collars.

There is simply no teaching, what-so-ever, that felt may be used as a structural component of a dog collar.

The outstanding obviousness rejections of claims 7-10 and 15 should be reversed.

ISSUE C

Whether the Applicant is entitled to coin the term **lofted** in accordance with the dictionary definition to non-obviously define over the prior art. Applicant submits that claim 6 is non-obvious over the prior art due to definition of a "single lofted upper nose member."

It is undisputed that the inventor may act as her own lexicographer and use the specification to supply new meanings for terms either explicitly or by implication. Moba, B.V. v. Diamond Automation, Inc., 2003 U.S. App. LEXIS 6285, 9 (Fed. Cir. April 1, 2003) quoting Markman v. Westview Instruments, Inc., 52 F.3d 967, 979, 34 USPQ2d 1321, 1330 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370, 38 USPQ2d 1461 (1996).

In the present case, the Applicant is fully entitled to be her own lexicographer and use the term "lofted" (that is not inconsistent with the standard dictionary definition) to generically describe a class of cord or rope that is "non-flat." However, the term "lofted" also implies an "airy" quality of

softness that is more comfortable to the touch. Thus, the term "lofted" is close to but not synonymous with the term "non-flat."

EXHIBIT G is a courtesy copy of the Oxford English Dictionary showing that Applicant's coined use of the term "lofted" is consistent with the dictionary definition.

The outstanding obviousness rejection as applied to claim 6 should be reversed.

ISSUE D

Whether substitution of metal rings for rubber rings is obvious in view of a Declaration from the very inventor of the reference relied upon by the Examiner. Applicant claims metal rings, which were specifically considered and then rejected by DeGroot, U.S. Patent No. 4,483,275. Applicant submits that claims 6, 12, 14, 16, 17-20 setting forth metal rings, and claim 24 setting forth the rotatable ring function are non-obvious in view of the prior art.

Attached hereto as EXHIBIT H is the Declaration of Alice DeGroot, BS., MS., DVM, dated February 4, 2004, and inventor of U.S. Patent No. 4,483,275 and 4,566,255..

Alice DeGroot used flexible rubber for the intended purposes of conforming to the canine head. See, e.g. EXHIBIT A, page 1. Dr. DeGroot specifically rejected metal rings as non-conforming to the canine head and as a possible source of nerve damage.

However, the Applicant determined through experimentation that metal rings are preferred because they do not cause nerve damage and allow the collar to more easily slide over the canine head without rubbing the fur.

It is respectfully submitted that one of strongest indicia of non-obviousness is the skepticism of experts in the field. In this case, not only was Dr. DeGroot skeptical, but she has also confirmed that such substitution of metal for rubber rings would be non-obvious.

Accordingly, should the Board find that the Examiner has met the initial burden of establishing a **prima facie** case of obviousness regarding the substitution of metal rings for rubber rings, it is respectfully submitted that the Declaration of Dr. DeGroot, submitted as EXHIBIT H, overcomes the **prima facie** case.

Claims 6, 12, 14, 16 and 17-20 particularly set forth metal rings and are respectfully submitted to be non-obvious over the prior art.

Claims 18-20 and 24 particularly set forth the functional result of the metal rings, namely that the straps rotate about portions thereof to better conform to the canine head. The art to Borchelt (I-IV) do not use rings. The art to DeGroot particularly sets forth "down-hole rubber" which itself bends, and therefore does not slide with respect to the straps. Accordingly, there is no art of records showing the functional

features of the metal rings, and therefore claims 18-20 and 24 non-obviously define over the art.

Withdrawal of the outstanding obviousness rejection as applied to claims 6, 12, 14, 16, 17-20, and claim 24 are respectfully requested.

ISSUE E

Whether the claimed "spaces defined by weaves of the woven fabric" (which are inherently locked) in claim 22 is taught by Tachi, et al., U.S. Patent No. 4,798,174, col. 1, ln. 49-52 which states "... holes ... composed of a gap or space formed between a pair of chain stitches not interlocking with each other ..." to support an obviousness rejection.

The intent of the Applicant is that the collar member is formed from "piercible woven fabric" in the sense that the fabric itself is piercible through all of the weaves, and not mere predetermined hole positions.

Applicant also respectfully directs the Board to the Abstract of Tachi, wherein "holes" are set forth for insertion of a pin. Whereas with the Applicant's invention, it is the weave itself that is pierced -- NOT predetermined holes.

Claim 23 sets forth a unitary non-flat member and therefore defines over the art for the reasons set forth in ISSUES A and B.

Claim 24 sets forth cheek straps that rotate and therefore defines over the art for the reasons set forth in ISSUE D.

ISSUE F

Whether the combined Declaration of Eric Udler (EXHIBIT I) demonstrating commercial success, in combination with the evidence of lack of utility of the prior art embodiments to Borchelt, and in combination with claimed limitations are sufficient to overcome the obviousness rejections of record.

The Office Action dated April 27, 2004, page 3, appears to suggest that the Declaration of Eric Udler (EXHIBIT I) must provide overwhelming support to be considered as evidence of commercial success.

The Applicant respectfully submits that the Udler Declaration along with the Applicant's book (EXHIBIT A) do in fact demonstrate commercial success of the product.

The Applicant is aware that there are competing products in the market place -- see EXHIBIT A. The purpose of Udler's Declaration is to demonstrate that while at first blush, the differences between the Applicant's invention and the prior art may seem small, their effect is big.

To take a step back from this case, it would seem to be an awful lot of trouble for the Applicant to invent **and** commercially sell a different type of canine head halter knowing that there

are five ("5") other types of halters available. The reason is simple. As a professional dog trainer, the Applicant discovered improvements that are significant when applied to the best interests of the dog.

Other commercially available products have significant disadvantages when used to train a dog. Both the DeGroot (U.S. Patent No. 4,483,275) and Borchelt (I-IV) devices have a flat braid across the snout of the dog that promotes wear. The DeGroot device includes rubber rings that wear the dogs fur and the Borchelt (I-IV) device does not even provide rings to promote flexibility and adjustment.

In short, the Declaration of Eric Udler provides strong evidence that the changes made by the Applicant are not trivial, but have resulted in demonstrated successful sales. Accordingly, the weight of the Applicant's features outlined in ISSUES A-E above should all be given additional weight in view of the Udler Declaration.

CONCLUSION

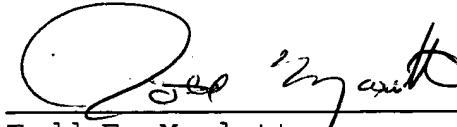
All rejections have been complied with, properly traversed, or rendered moot. The Board of Appeals is therefore respectfully requested to reverse all rejections and allow the subject application.

Serial No.: 09/736,408

Atty. Docket: 4523-001

Favorable consideration and allowance are earnestly
solicited.

Respectfully submitted,



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CLAIMS AS THEY STAND

6. (PREVIOUSLY PRESENTED) A canine head halter, comprising:

a collar member configured and arranged to encircle a canine neck behind the ears and below the chin, said collar member including a top strap respectively connected at first and second ends thereof to first and second metal collar rings, and a bottom strap respectively connected at first and second ends thereof to the first and second collar rings to thereby form a continuous loop;

a snout loop configured and arranged to encircle the canine snout including a single lofted upper nose member respectively connected at first and second ends thereof to first and second metal snout loop rings, and an under chin member respectively connected at first and second ends thereof to the first and second snout loop rings to thereby form a continuous loop;

a first cheek strap connecting the first collar ring to the first snout loop ring;

a second cheek strap connecting the second collar ring to the second snout loop ring; and

an under chin strap connected at a first end to the bottom strap of said collar member and connected at a second end to a metal cinch ring, wherein a portion of the under chin member of

said snout loop is drawn through the cinch ring for attachment to a dog leash.

7. (PREVIOUSLY PRESENTED) A canine head halter, comprising:

a collar member configured and arranged to encircle a canine neck behind the ears and below the chin;

a snout loop configured and arranged to encircle the canine snout, said snout loop having a unitary non-flat portion to contact the upper canine snout when worn;

first and second cheek straps directly connecting the collar member to the unitary non-flat portion; and

an under chin strap connected at a first end to said collar member and connected at a second end to a ring,

wherein a lower portion of said snout loop is drawn through the ring to close the canine jaw.

8. (PREVIOUSLY PRESENTED) The canine head halter according to claim 7, wherein a dog leash is connected to the lower portion of said snout loop after being drawn through the ring.

9. (PREVIOUSLY PRESENTED) The canine head halter according to claim 7, wherein a retaining ring is attached about the lower portion of said snout loop after being drawn through the ring to

thereby retain the drawn relation of the lower portion of said snout loop and the ring.

10. (PREVIOUSLY PRESENTED) The canine head halter according to claim 7, wherein the non-flat portion of said snout loop has rounded edges to thereby reduce chafing.

11. (PREVIOUSLY PRESENTED) The canine head halter according to claim 7, wherein said first and second cheek straps are respectively connected to said collar member by respective first and second rings.

12. (PREVIOUSLY PRESENTED) The canine head halter according to claim 11, wherein the first and second rings are metal.

13. (PREVIOUSLY PRESENTED) The canine head halter according to claim 11, wherein said first and second cheek straps are respectively connected to said snout loop by respective third and fourth rings.

14. (PREVIOUSLY PRESENTED) The canine head halter according to claim 13, wherein the third and fourth rings are metal.

15. (PREVIOUSLY PRESENTED) The canine head halter according to claim 7, wherein the non-flat portion of said snout-loop is cotton/nylon braid having a cylindrical shape.

16. (PREVIOUSLY PRESENTED) The canine head halter according to claim 7, wherein said collar member includes a top strap respectively connected at first and second ends thereof to first and second metal rings, and a bottom strap respectively connected at first and second ends thereof to the first and second rings to thereby form a continuous loop.

17. (PREVIOUSLY PRESENTED) A canine head halter, comprising:

a collar member configured and arranged to encircle a canine neck behind the ears and below the chin, said collar member including top and bottom straps respectively connected by first and second metal rings;

a snout loop configured and arranged to encircle the canine snout including an upper nose member and an under chin member respectively connected by third and fourth metal rings;

a first cheek strap connecting the first and third rings, and a second cheek strap connecting the second and fourth rings; and

an under chin strap connected at a first end to the bottom strap of said collar member and connected at a second end to a fifth ring,

wherein a portion of said snout loop is drawn through the fifth ring to close the canine jaw.

18. (PREVIOUSLY PRESENTED) The canine head halter according to claim 17, wherein the first cheek strap rotates about a portion of the first ring and rotates about a portion of the third ring to conform to the canine head.

19. (PREVIOUSLY PRESENTED) The canine head halter according to claim 18, wherein the second cheek strap rotates about a portion of the second ring and rotates about a portion of the fourth ring to conform to the canine head.

20. (PREVIOUSLY PRESENTED) The canine head halter according to claim 17, wherein the first cheek strap rotates about a portion of the first ring and a portion of the third ring, and the second cheek strap rotates about a portion of the second ring and a portion of the fourth ring such that the canine head halter conforms to the canine head.

21. (PREVIOUSLY PRESENTED) The canine head halter according to claim 17, wherein the upper nose member of said snout loop is a unitary non-flat member.

22. (PREVIOUSLY PRESENTED) A canine head halter, comprising:

a collar member configured and arranged to encircle a canine neck behind the ears and below the chin, said collar member formed from piercible woven fabric that is permanently attached at a first end to a buckle, said buckle connecting the first end of said collar member to a plurality of positions along a second end of said collar member by piercing through spaces defined by weaves of the woven fabric;

a snout loop configured and arranged to encircle the canine snout including an upper nose member and an under chin member;

first and second cheek straps directly connecting the collar member to said snout loop; and

an under chin strap connected at a first end to said collar member and connected at a second end to a cinch ring,

wherein a portion of said snout loop is drawn through the cinch ring to close the canine jaw.

23. (PREVIOUSLY PRESENTED) The canine head halter according to claim 22, wherein the upper nose member of said snout loop is a unitary non-flat member..

24. (PREVIOUSLY PRESENTED) The canine head halter according to claim 22, wherein said first cheek strap is connected to said collar member by a first ring and said second cheek strap is connected to said collar member by a second ring, such that said first and second cheek straps rotate about respective portions of the first and second rings to conform to the canine head, and

wherein said first cheek strap is connected to said snout loop by a third ring and said second cheek strap is connected to said snout loop by a fourth ring, such that said first and second cheek straps rotate about respective portions of the third and fourth rings to conform to the canine head.

25. (PREVIOUSLY PRESENTED) The canine head halter according to claim 22, wherein the non-flat portion of said snout loop has rounded edges to thereby reduce chafing and all rings are metal.



**SUMMARY OF EXHIBITS
FOR CONSIDERATION BY BOARD**

Atty Docket	Serial No.
MFB-0001	09/736,408
Applicant	Miriam Fields-Babineau
Filing Date	Group Art Unit
Dec. 15, 2000	3644

OTHER (Including Author, Title, Date, Pertinent Pages, etc.)

Exhibit A	Dog Training with a Head Halter, pp. 1-4
Exhibit B	Snoot Loop Halter for Dogs ("Borchelt IV")
Exhibit C	New York Law Journal, December 8, 2000
Exhibit D	M.P.E.P. 8th Edition, Rev. 2, dated May 2004, pp. A-25
Exhibit E	The Thomas Register 1999, pg. 10976, section CORDAGE BRAIDED
Exhibit F	The Thomas Register 1999, pg. 10930, section CORD: DOG LEASH
Exhibit G	Oxford English Dictionary Online, 2003 Oxford University Press, dictionary definition for "lofted", pg. 1, http://dictionary.oed.com .
Exhibit H	§ 132 Declaration of Alice De Groot, BS., MS., DVM, dated February 4, 2004, and inventor of U.S. Patent No. 4,483,275 and 4,566,255
Exhibit I	§ 132 Declaration of Eric Udler

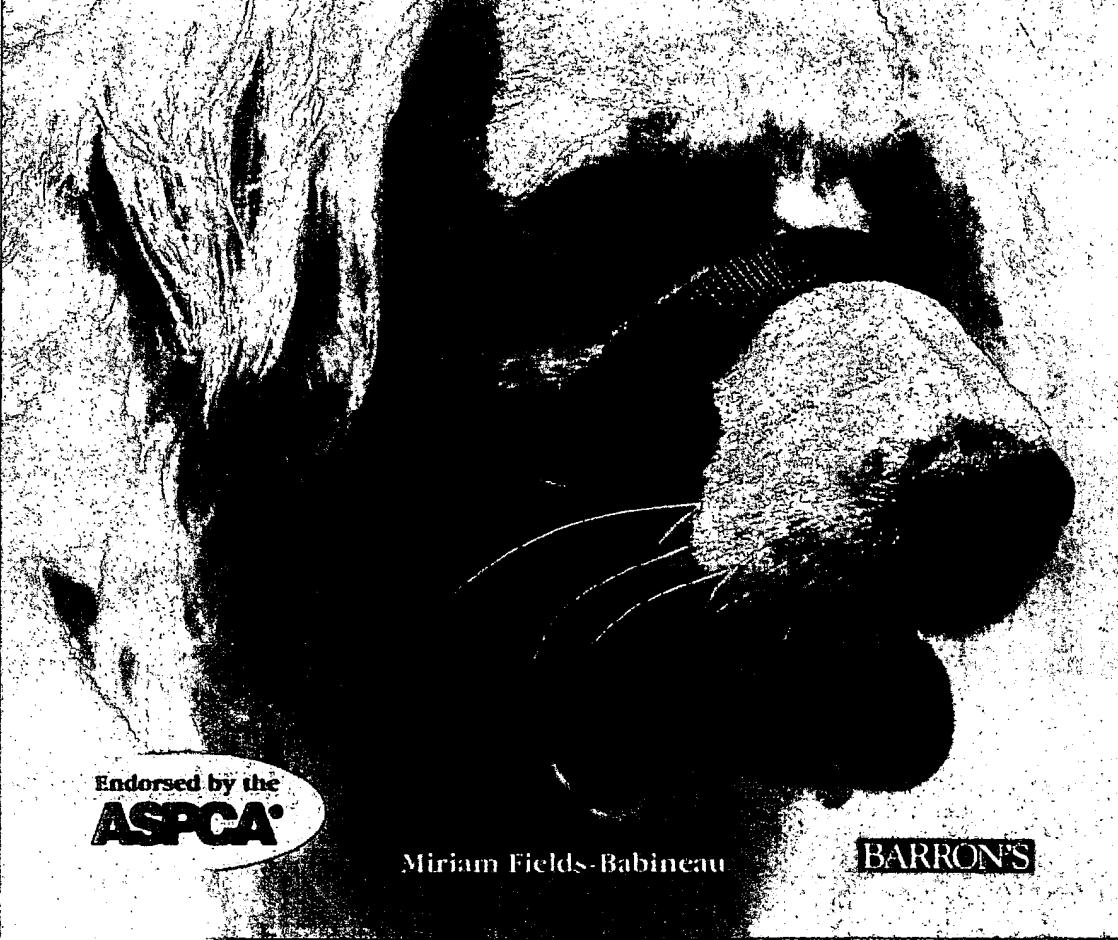
Examiner

Date Considered

EXAMINER: Due to the large number of Exhibits, the Examiner is kindly requested to initial along side each exhibit and include a copy of this form with next communication to Applicant.

Dog Training with a Head Halter

The most effective way to correct canine behavior problems



Endorsed by the
ASPCA®

Miriam Fields-Babineau

BARRON'S

Introduction



K-9 Kumalong

In 1965 Michael Fox, John Scott, John Fuller, and Cletrice Plattenberger reported their findings on canine communication, learning processes, and behavior. The 1970s brought the British trainer, Barbara Woodhouse, into millions of homes through her books and television shows, increasing public awareness of how much dogs need to be trained. People became more cognizant of the importance of training their pets. However, the same elements remained—neck collars and choke chains.



Halti

In the late 1970s Dr. Alice DeGroot, an American veterinarian, noticed that horses and dogs could be controlled in similar ways. Through her work with rescued Irish Wolfhounds, Dr. DeGroot discovered that leading a dog by the head, as one would walk a horse, offered a less negative experience, faster learning, and better control without having to match muscle strength. The head halter worked, not only in teaching basic commands, but also in overcoming destructive behaviors. Through her behavioral studies and training skills, she invented the K-9 Kumalong, which was patented in 1984. Logical training was born. Where the head goes, the body follows.

Head halters not only reduce a dog's ability to pull, but also mimic the way mother dogs communicate with their puppies. When a youngster misbehaves, she grabs him by the muzzle and growls. The halter, when pulled down on the muzzle, is similar to mother's message. The neck strap, positioned behind the ears, maintains the position of the nose strap. Thus, the halter works in several ways, reducing the dog's pull by up to 90 percent (a real boon to a small person trying to train a large dog) and showing the dog that his handler maintains the Alpha position.

In 1984 Dr. Robert K. Anderson, D.V.M., Ruth Foster, and Jeffrey Levine developed the figure 8 head halter—the Gentle Leader. The Gentle Leader was the second type of head halter developed and patented in the United States. The Gentle Leader utilizes a similar type of pressure but is more difficult for the dog to remove. This device combines a regular collar and a halter, allowing the user to walk a well-behaved dog with a neck collar and a poorly behaved dog with the head halter. When the head halter portion is no longer required, the strap becomes a pull tab when training the dog off-lead. The pull tab

Introduction



BeHave



Gentle Leader

is a means of regaining control of a dog that presents a minor challenge for the handler, such as not heeling in the proper position.

Another figure 8 halter, the BeHave, was developed by Nancy David and John Doerr of Carlsbad, California. The BeHave also offers the user the options of using it either as a regular collar, head halter, or choke collar. The BeHave also includes a leash, making it an all-in-one product.

The Gentle Leader and BeHave halters have a clip below the jaw that can tighten the nose strap, making it more difficult for the dog to remove the halter. These products were designed to allow dog owners to leave the halter on while in the house with their dog, as an aid in reducing in-home behavior problems.

Dr. Roger Mugford, Ph.D., a British psychologist, developed a head halter similar in style to Dr. DeGroot's K-9 Kumalong--the Halti. Haltis have been sold in the United States since the mid-1980s. With an adjustable neck strap and always loose nose piece, it is utilized very similarly to a horse's halter. It guides the dog's head without restriction and, as with the other head hal-

ters, can be used to control lunging and aggression.

The Snoot Loop (patent pending), developed by Dr. Peter Borchelt, Ph.D., is another conventional halter based on Dr. DeGroot's K-9 Kumalong. This head halter allows for more variation in head shape, with adjustable back, sides, and nose loop. Dr. Borchelt has also recently developed a head halter for use



Snoot Loop

Introduction



Comfort Halter

on dogs with brachiocephalic (short) noses, such as Pugs, Boston Terriers, and English Bulldogs.

The latest head halter to enter the market is the Comfort Halter, designed by the author of this book. Of similar design to the K-9 Kumalong, it offers a thinner, softer nose piece, is easily adjustable, and has a neck strap that does not loosen with use.

As a dog owner, you want to be assured that your beloved pet will learn to behave and not be hurt in the process. Although it is impossible to entirely abolish all negative factors in training, eliminating as many as possible makes for more effective schooling. It is a proven fact that both dogs and people learn faster if they are not grappling with each other at the same time. Not only is the head halter the easiest means of controlling your dog, it also renders all other training devices obsolete.

Head halters are easy to use, the communication is clearer, and dogs learn faster. No more going for a walk and returning with one arm longer than the other. No more damaging a dog's neck from improper use of a choke chain. And no need to cause pain, as with a pinch collar or an electronic collar, to obtain a response. In fact, head halters work very well on dogs that are pain tolerant, dominant, and/or unresponsive to pain. Halters can be used on puppies or adult dogs of almost any temperament with positive results.

People around the world are learning about the ease and logic in training with a halter. Seminars, animal expositions, and conferences are relaying the message that there is a better way, a more humane way to train your dog. Teach your dog using logic, not pain. Use a head halter. Your dog will learn faster.

SNOOT LOOP®

* Fully Adjustable * Easy to Use HALTER FOR DOGS



The Snoot Loop halter gives you easy, gentle control over your dog. The Snoot Loop, attached to a leash, guides your dog's head. Because the leash attaches under the chin instead of at the neck, your dog cannot pull or lunge as it can with a collar. You do not need to yank or pull on the leash and your dog does not strain and choke. Even a small dog can exert a lot of force by pulling on a collar with its neck and shoulders. With the Snoot Loop, even a small, light-weight person can easily control a large dog. Your control becomes more like the gentle guidance you give a well-trained riding horse than the constant pulling of an unruly dog.

Since you now have easy control, you can give your dog room outdoors to sniff, explore, and play. You can effectively teach your dog to refrain from jumping up on people, inside or outside the home. And you can use the Snoot Loop to prevent and stop barking or growling.

With the Snoot Loop, you do NOT "jerk" the leash. A gentle, steady, light pull is sufficient. Your dog learns by itself that pressure on the nose loop means "stop" and that it cannot go forward until pressure on the nose loop ceases. You do not even need to use your voice as a signal, although you may if you wish.

ADJUSTING THE SNOOT LOOP FOR YOUR DOG.

The Snoot Loop comes in a variety of styles and sizes (see page 4). Each size is fully adjustable so it can comfortably fit your dog, but YOU have to adjust it correctly so it fits YOUR dog. Read these instructions carefully. It may take you 5 or 10 minutes and several tries to get it right. Do NOT try to adjust the Snoot Loop while it is on your dog. First, adjust the Snoot Loop for an approximate fit, try it on your dog, then take it off and adjust again as many times as necessary until it fits correctly and comfortably.

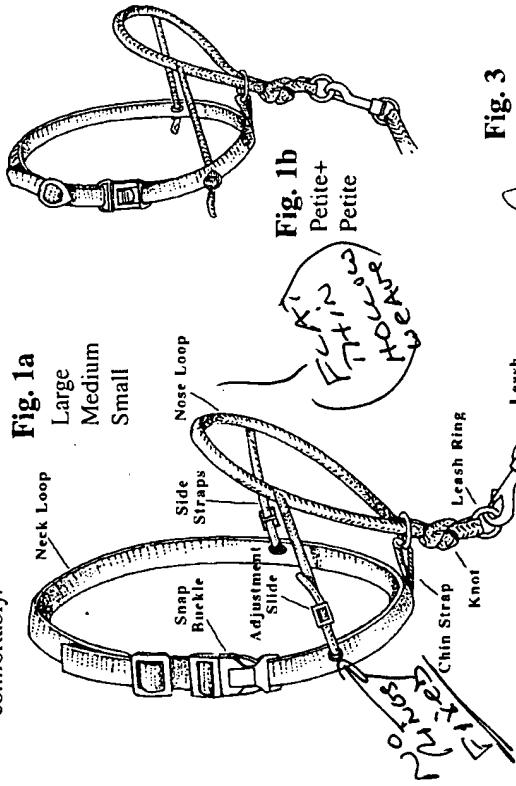


Fig. 1a

Fig. 1b

Fig. 3

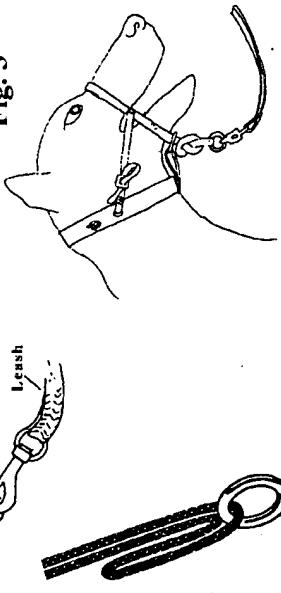


Fig. 2

1. Nose Loop The nose loop is adjusted by tying a knot just above the leash ring, or a bit higher if necessary (Fig. 1a, 1b). If a knot makes the nose loop too tight for your dog, use the next larger size halter, or slightly shorten the nose loop with a fold (Fig. 2) and then stitch the fold securely.

The nose loop should be adjusted long enough so that your dog can eat, drink, chew a bone, carry a toy, and yawn (Fig. 3). It should NOT be so long the dog can paw the lower portion of the nose loop into its mouth. If the dog gets the nose loop into its mouth and chews it, the Snoot Loop can be quickly destroyed.

Regular Sizes - Samples of Breeds

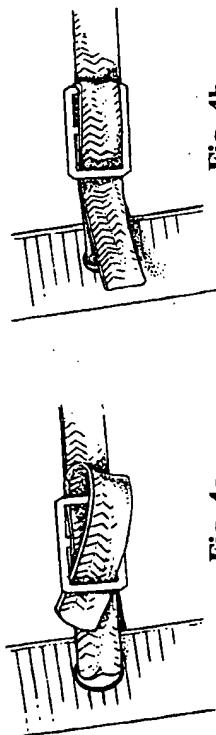


Fig. 4a

Fig. 4b

II. Side straps The length of the side straps on the large, medium and small halters is adjusted with metal sliders. The side straps should be long enough to keep the nose loop away from the dog's eyes, but short enough to prevent the nose loop from being pulled over the tip of the dog's nose.

After you have adjusted the side straps correctly, tuck the forward facing free end of the side strap back under the rear bar of the slider (on each side) to lock the side strap length into place (4a, 4b).

The side straps on the petite halters are adjusted by tying a knot on the far side of the holes in the neck loop. To prevent the knots from working loose over time, put a second knot tightly behind the first knot.

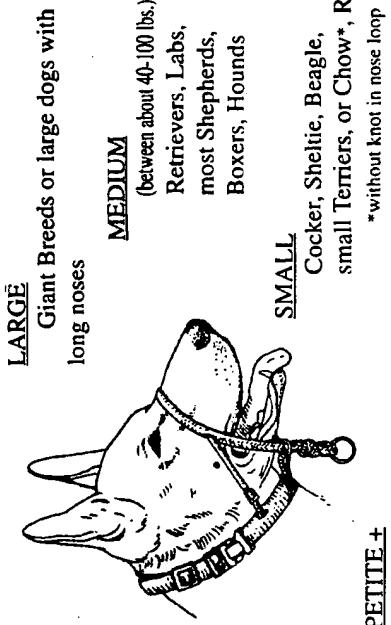
III. Neck Loop The neck loop should be adjusted so that it fits FIRMLY just behind the dog's ears. When fitted correctly, it will be tighter than a regular collar. If your dog has long hair, be sure you do not catch any hairs in the snap buckle. If the neck loop is too loose, the dog will be able to pull the nose loop over the nose. For the petite and small Snoot Loop, you should be able to fit only one or two fingers (side by side) under the neck loop. For the medium and large Snoot Loop, if you can fit two fingers on top of each other, the neck loop is too loose.

GETTING YOUR DOG ADJUSTED TO THE SNOOT LOOP

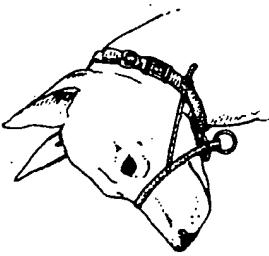
Some dogs will accept a halter immediately with little or no resistance. Other dogs will paw at the halter and try to get it off before accepting it. Take the time to get your dog comfortable and happy with the Snoot Loop. At first, the loop over the nose feels strange — just as a collar did the first time it was worn. However, if fitted correctly, there is no discomfort with the Snoot Loop and your dog should be able to eat, drink, chew, and play while wearing it.

Distraction and positive associations: Anything you can do to distract your dog after putting on the halter for the first time will help your dog accept it. Use favorite food treats or toys, or take your dog for a walk where there are many interesting sights and smells. Encourage your dog to walk at a brisk pace and allow it to sniff and explore. Soon the Snoot Loop will be no more distracting than a collar. Establishing positive associations with the Snoot Loop is best accomplished by several brief trials of putting on the halter, providing the positive event, and removing the halter for 10 or 20 minutes before beginning again. If your dog tries to pull off the halter,

3



*without knot in nose loop



PETITE +
Jack Russell, small Terriers,
Lhasa Apso, Shi-Tzu,
Dachshund, Mini Poodle

PETITE
Toy Breeds - Yorky,
Min. Dachshund, Maltese,
Toy Poodle, Chihuahua

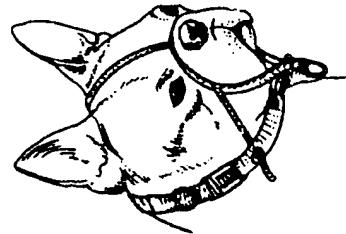
"B" Sizes Brachycephalic (short-nosed) Samples of Breeds

MEDIUM
Bulldog or short nosed Large Dogs,
Chow, Rottweiler, some Pitbulls

SMALL
Small English Bulldog, French Bulldog,
or Chow*, Rottweiler*
*without knot in nose loop

PETITE +
Boston Terrier*, Pug*
Pekingese, toy Spaniel
*no knot, maybe a fold and stitch in nose loop

PETITE
Pekingese, toy Spaniel



4

it will usually grab the leash with its paws and pull, thereby tightening the nose loop. Most dogs quickly learn to stop pulling on the leash and to accept the halter.

Using the Snoot Loop with an extendible/retractable leash is helpful because your dog then has more room to sniff, explore, and play, but you still have control.

Restraint: If your dog PULLS to get ahead while walking, simply stop and hold the leash firmly in place so that forward movement is impossible. The moment your dog stops pulling, release the pressure and allow your dog to move forward again. For JUMPING UP or BEGGING, simply apply light pressure on the leash to prevent these behaviors, and release only when the dog stays down.

Some dogs struggle the first time the nose loop tightens as you use the halter for restraint. You should NEVER jerk or use the halter in the way choke collars are used for "corrections" in typical obedience training methods. If your dog struggles when the loop tightens around the nose and perhaps shakes its head from side to side, hold the leash firmly. If there is slack on the leash, shorten it so your hand is closer to where the leash snaps on the halter (closer to your dog's chin). Pull upward slightly, pointing the nose in the air, holding steady until your dog relaxes, then IMMEDIATELY release the pressure, praise your dog (for relaxing) and resume walking. This should be done calmly, with no reprimands, scolding, or loud commands.

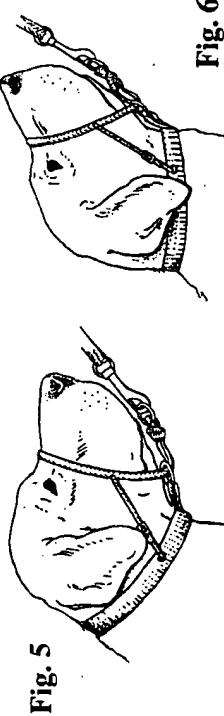


Fig. 5

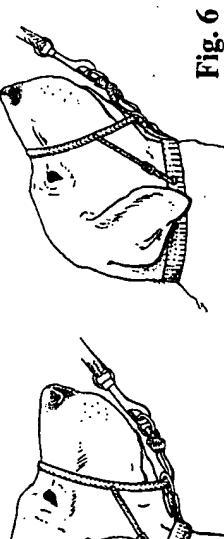


Fig. 6

BARKING AND GROWLING

To stop or prevent barking and growling, act at the moment your dog begins the undesirable behavior. Apply a firm, steady pressure forward (Fig. 5) or upward (Fig. 6) to close the dog's mouth and inhibit barking and growling. Maintain a firm pressure (just enough to keep your dog's mouth closed, NOT enough to lift the front feet off the ground) until your dog visibly relaxes. Then IMMEDIATELY begin to release the pressure and praise, pet or give your dog a treat. You are reinforcing the relaxed behavior, not the barking and growling that preceded it.

For your dog to learn not to bark and growl, all you have to do is repeatedly and consistently associate the stimulus (cause) of the barking/growling (a person, another dog, noise, etc.) with relaxed non-barking/non-growling behavior until less pressure is needed on the Snoot Loop.

Eventually, the Snoot Loop is no longer necessary for your dog to be quiet and friendly.

IF you tried this method and it did not work, and definitely if the dog is likely to BITE or in any way INJURE a person or another animal, DO NOT USE THE SNOOT LOOP WITHOUT THE SUPERVISION OF A CERTIFIED APPLIED ANIMAL BEHAVIORIST, A VETERINARIAN BOARD CERTIFIED IN APPLIED ANIMAL BEHAVIOR OR AN EXPERIENCED TRAINER FAMILIAR WITH USING HALTERS FOR AGGRESSIVE DOGS.

DAMAGE TO THE SNOOT LOOP

A dog with sharp claws that scratches at the Snoot Loop will cause "snags" or "runs" in the side straps or the lower part of the nose loop. If this happens, take the Snoot Loop off and pull hard to straighten out the "runs" and use a scissors to trim the "snags." This will not weaken the Snoot Loop unless your dog has been scratching at it for a long time. It helps to trim your dog's nails before fitting the Snoot Loop.

If the Snoot Loop is adjusted properly, your dog cannot chew any part of it. But if the side straps are too long, the neck strap too loose, or the nose loop too big, your dog can get the nose loop in its mouth, chew it, and destroy the Snoot Loop.

CAUTION

On some dogs, the Snoot Loop will compress the hair under the nose loop and the hair may remain flattened for a short while after the Snoot Loop is removed. For most dogs, this is not a problem. But for some dogs (particularly the Shar-Pei), you need to be careful that the nose loop does not abrade the skin on the top and sides of the nose. Make sure the Snoot Loop is not fitted too tightly and that you do not jerk the leash. Should a problem occur, a piece of felt, flannel or fleece can be wrapped in one layer around the nose loop and sewn to form a close fitting tube (fig. 7). The nose loop will slide within this soft cushioned tube, protecting the skin while you retain control of the dog. Rarely, a dog will protest a halter (even the Snoot Loop)

so vigorously and continuously that it cannot be used successfully. Such a dog is likely to exhibit major behavior problems and help should be sought from a professional trained in applied animal behavior.

CUSTOM MADE SNOOT LOOPS

If the Snoot Loop cannot be adjusted to fit your dog correctly, call or fax us and we can custom make one for your dog.

Problems, questions or comments contact:

Peter L. Borchelt, Ph.D.
Animal Behavior Consultants, Inc.
102 Canton St., Brooklyn, NY 11229
(718) 891-4200 or (800) 339-9505, Fax: (718) 891-0741
<http://www.animalbehavior.com>

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New York Law Journal

December 8, 2000 Friday

SECTION: VERDICTS & SETTLEMENTS; Pg. 5

LENGTH: 1855 words

BODY:

SUBWAY ACCIDENT

\$ 2.2 million settlement

William Watson v. NYCTA 117422/97

Nov. 9; New York Supreme

ATTORNEYS: Donald D. Brown and Brian D. Acard of Spiegel, Brown, Fichera & Acard, Poughkeepsie, for the plaintiff William S. Jones of Wallace D. Gossett, Brooklyn, for the defense.

FACTS: At approximately 4:30 a.m. on March 28, 1997, plaintiff, a 28-year-old truck driver, was alone on the uptown platform at the 28th St. station, waiting for the No. 1 train. Plaintiff claimed that as he stood at the edge of the platform to check for the train, he slipped and fell to the tracks below. He was subsequently run over by a subway train. During discovery, it was revealed that another train had gone through the station just prior to the one that struck plaintiff and had experienced an uninitiated application of the emergency brake, or trip cock. A released trip cock indicates that the train's wheels struck a foreign object; under Transit Authority procedure, the operator is required to stop the train, shut off the engine, and investigate the matter. The accident was not reported to the Transit Authority until the operator of the second train called it in. Plaintiff argued that he was struck by the first train while lying on the tracks, which triggered that train's trip cock, but that his legs were not amputated until the second train passed through the station 30 minutes later. Plaintiff contended that the second train would not have run him over if the operator of the first train had followed procedure.

INJURIES: Traumatic bilateral leg amputations at the knee level. Plaintiff required bilateral surgical amputation, which further reduced his legs to the mid-thigh level. Although he has prosthetic legs, plaintiff uses a wheelchair to ambulate. For the past year, he has been employed in a clerical position. Plaintiff had gone to college in his early 20s on a basket-ball scholarship; he is presently the leading scorer for the Roller Knicks, a wheelchair basketball team in New York.

DISBURSEMENT: This action settled prior to jury selection for a present value of \$ 2,200,000, with an estimated structure of more than \$ 10 million (40

years), including: approximately \$ 300,000 for past medical expenses; \$ 882,000 for life care expenses; \$ 70,000 for past lost earnings; and, \$ 550,000 for future lost earnings (present value).

FALLDOWN

\$ 1.7 million verdict

Sabina Chrapowicka v. Est. of Joseph Wilner and Riva and Harry Wilner
23296/97

Oct. 17; Queens Supreme

JUDGE: Herbert A. Posner

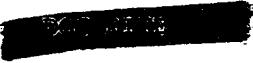
ATTORNEYS: David H. Perecman of Perecman & Dersovitz, Manhattan, for the plaintiff. Arthur Simuro of Smetana & Schwartz, Melville, for the defense.

FACTS: On Oct. 15, 1994, plaintiff, a 59-year-old sewing machine operator, tripped and fell on the stairs of her apartment building on Myrtle Ave. in Queens. Plaintiff claimed that the stairs' mats were worn away and missing in certain sections. Defendant denied notice of the condition. It argued that plaintiff had lived in the building for 13 years and was aware of the condition. Defendant claimed that the accident was due to plaintiff's own negligence.

INJURIES: Bimalleolar fracture of the ankle requiring open reduction and internal fixation with plates and screws. Plaintiff underwent physical therapy. Plaintiff also receives ongoing orthopedic treatment for arthritis and swelling in the ankle. Plaintiff's orthopedist testified that the arthritis will worsen and may eventually require surgery. Defendant's neurologist testified that plaintiff did not suffer any neurological disabilities. Defendant's orthopedist testified that plaintiff's lost range of motion was 10 degrees to 35 degrees and that plaintiff's foot was fully functional. On cross-examination, he conceded that he measured passive range of motion only. Plaintiff walks with a limp and uses a cane.

JURY TRIAL: The trial lasted seven days before a jury of three males and three females. A post-trial motion is pending.

DISBURSEMENT: \$ 590,000 for past pain and suffering; \$ 881,000 for future pain and suffering; \$ 15,000 for past medical expenses; \$ 100,000 for past lost earnings; \$ 100,000 for future lost earnings.


\$ 1 million verdict

Gabriel Febbraio v. Peter Borchelt, Evelyn Smith, and Lucy Febbraio 13007/97

Oct. 6; Kings Supreme

JUDGE: Martin Schneier

ATTORNEYS: Kevin E. Rockitter, Woodbury, for the plaintiff. Oscar Michelen of

Sandback, Birnbaum & Michelen, Mineola and Patricia Loquet of Frank A. Composto, Brooklyn for defendants. Evelyn Smith defaulted.

FACTS: Plaintiff, Gabriel Febbraio, a 45-year-old retired firefighter, claimed that on Feb. 25, 1997, he was bitten by an 80-pound pit bull that was in front of his mother's two-family home in Brooklyn. The dog was owned by defendant Evelyn Smith, and it was being trained by Peter Borchelt, a professional dog trainer who lived in an apartment in the two-family home. Mr. Febbraio claimed that as he approached Mr. Borchelt and the dog, he asked Mr. Borchelt if the dog was "OK" and Mr. Borchelt indicated that it was. Plaintiff contended that as he went to pass, the dog lunged at him and bit him in the groin. He claimed that the dog had vicious propensities of which defendants were aware. Defendants denied that the dog had vicious propensities, but Mr. Borchelt conceded on cross-examination that he was aware of two prior attacks by the dog.

INJURIES: Injury to the tip of the penis requiring surgery, psychological injuries, and sexual dysfunction. Plaintiff underwent eight months of urological treatment.

JURY TRIAL: The trial lasted two days before a jury of three females and three males, with two hours of deliberations. The claims against Evelyn Smith and Lucy Febbraio were dismissed. Defendant Borchelt is uninsured and is planning an appeal.

DISBURSEMENT: \$ 1 million versus Mr. Borchelt. Breakdown: \$ 500,000 for past pain and suffering; \$ 500,000 for future pain and suffering.

LABOR LAW

\$ 1.9 million settlement

Leswyn Campbell v. Rockefeller University v. Alex Figliola Contracting Corp.
2980/98

Oct. 18; Kings Supreme

JUDGE: Reynold N. Mason

ATTORNEYS: Devon Reiff of Brecher, Fishman, Pasternack, Popish, Feit, Heller, Rubin & Reiff, Manhattan, for the plaintiff. Sherman B. Kerner of Turner & Owen, Manhattan, for the defense.

FACTS: On Sept. 16, 1997, plaintiff, a 33-year-old laborer employed by third-party defendant, was on a job site at defendant University in Manhattan. Third-party defendant, a commercial plumbing contractor, had been hired by defendant in mid-August of that year to repair an emergency leak in a sewer pipe located in a driveway leading to the campus; the leak was repaired at a depth of four feet. Defendant later extended its contract with third-party defendant to replace the entire 250 feet of sewer pipe after discovering that the underground pipes leading from the initial leak required repair in several locations. On the subject date, plaintiff and a coworker were in a trench when it collapsed. Although the coworker called out a warning to plaintiff before escaping himself, plaintiff was unable to get out of the trench in time and was covered up to his hips in dirt; he was bent over a breaking pipe at the time of the accident.

Plaintiff claimed that the trench was nine feet, three inches deep. Plaintiff claimed that defendant violated Labor Law § 241(6), which states that owners are required to shore up trenches with a depth of 5 feet or more. Defendant's director of plant operations and third-party defendant were both twice deposed. Defendant's employee stated both times that the trench was four feet deep; third-party defendant also twice stated that it was four feet deep, and that it caved in while plaintiff was admittedly bent down. No progress photographs were taken on the subject date, and work reports made no mention about the depth and length of the trench.

Defendant contended that plaintiff was responsible for his own accident because he failed to take proper precautions. It contended that plaintiff had a stockpile of lumber at the site for shoring. Defendant claimed that plaintiff knew the trench was dangerous and even complained to his boss about it, and that he was at fault for working in it anyway. Plaintiff testified that he and his coworker placed two planks in the trench. Defendant contended that if plaintiff took such inadequate measures on his own, he should be held responsible for his own accident. Plaintiff contended that his position was that of a laborer, for which he was paid only \$ 9 per hour, and that it was his job to take orders and not to give them. Defendant argued that at his EBT, plaintiff called himself a foreman. Plaintiff argued that he loosely used the term "foreman" at his deposition as a way to describe his being a group leader when a foreman was unavailable at a job site.

Plaintiff subpoenaed defendant's former employee, the assistant to the director of plant operations, who was present on a daily basis at the job site. Plaintiff also subpoenaed an individual currently employed by defendant who was responsible for taking the pre-trial photographs of the job site and trench. The employee testified that he only took photographs up until Aug. 21, 1996, during the first phase of the job, and that those were not progress photographs, but were taken on his own initiative to record where the initial leak took place.

Plaintiff alleged that the employee took photographs of the site and the trench over a period up to and including the subject date, but that he refused to produce them. The employee denied the allegation and would not concede that any of the photographs showed a fair and accurate depiction of the trench as it looked on the subject date. Both plaintiff and defendant's former assistant to the director of plant operations testified that some of the photographs fairly and accurately depicted the depth of the trench as being approximately eight to 10 feet; both testified that it remained that size for one week before the accident. Plaintiff claimed that defendant was more involved in day-to-day supervision of the job than it admitted in that it performed its own on-site "snake scope" of the entire sewer pipe system to determine the extent of the leaking and repair required.

Prior to trial, third-party defendant moved for summary judgment on the basis that because plaintiff did not sustain a grave injury under the Workers' Compensation Omnibus Act of 1996, a third-party action was therefore barred. The motion was granted by Judge Ira B. Harkavy.

INJURIES: Multiple fractures to the pelvis and injuries to the bladder, prostate, and urethra requiring surgical repair. Impotence resulted and was corrected with penile implant.

JURY TRIAL: A one week trial before a jury of five females and one male ended with a verdict for the plaintiff on liability against Rockefeller University after three hours of deliberations. The case settled for \$ 1.9 million just before the verdict was read. Third-party defendant's motion for summary judgment was granted prior to trial by Judge Ira B. Harkavy.

LOAD-DATE: December 19, 2000

LIST OF DECISIONS CITED

Hoffman, Ex parte, 12 USPQ2d 1061 (Bd. Pat. App. & Inter. 1989)	2111.03
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Hybritech, Inc. v. Monoclonal Antibod- ies, Inc., 802 F.2d 1367, 231 USPQ 81 (Fed. Cir. 1986) 716.03(b), 2138.04, 2141, 2144.08, 2163, 2164.01, 2164.05(a), 2173.05(a), 2182, 2184	
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MO: VILLA PARK

Bardley & Associates, Inc., 16852 Lancaster Est. Ln., NR

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lofted, *ppl. a.*

SECOND EDITION
1989

(*lɒftɪd, -ɔːtɪd*, -ɔːr-) [f. LOFT *n.* and *v.* + -ED.]

1. Of a house: **a.** Ceiled or floored (*obs.*). **b.** (*Sc. and north. dial.*) Having one or more stories above the ground floor.

1549 *Compl. Scotl.* xi. 96 That na Scottis man suld duel in ane house that vas loftit, bot rather in ane litil cot house. **1639** *Declaration in Athenaeum* 19 July (1890) 99/2 The dwelling howse of her brother..was all well lofted and boarded over wth oken boards. **c1730** BURT *Lett. N. Scotl.* (1760) II. xxii. 205 If any one has a Room above, it is by way of Eminence called a lofted House. **1814** SCOTT *Wav.* xix, A lofted house, that is a building of two stories. **c1856** *Denham Tracts* (1892) I. 343 The house being what in those districts [Northumberland] is termed lofted.

2. Golf, etc. **a.** Of a cleek or club: Made with a ‘loft’ (see LOFT *n.* 7a). **b.** Of a stroke: That ‘lofts’ the ball.

1887 W. G. SIMPSON *Golf* 158 Certainly a more lofted cleek might be used. *Ibid.* 159 If a half-topped shot travels further than a lofted one over ordinary turf, the club has too much pitch. **1890** HUTCHINSON *Golf* (Badm. Libr.) 122 Using..an exceptionally lofted club to obtain the same result. *Ibid.* 200 The lofted approach is not a fancy shot.

c. Of a ball: hit into the air.

1904 *Daily Chron.* 20 Aug. 9/5, I saw a lofted ball..miss the head of a player in front by not more than six inches. **1955** *Times* 29 June 4/3 He made the winning hit, a lofted straight four, on the stroke of time. **1963** *Times* 27 May 5/3 The same player scored from a 30-yard penalty, while Ramsden replied with a well lofted hit from 40 yards.

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of :
Miriam Fields-Babineau :
Serial No.: 09/736,408 : Art Unit: 3644
Filed: December 15, 2000 : Examiner: Smith, Kimberly
For: COMFORT TRAINER : Atty Docket: 4523-001
("CANINE HEAD HALTER") : (MFB-0001)

DECLARATION UNDER 37 C.F.R. §1.132
ALICE DE GROOT, BS., MS., DVM

I am Alice De Groot, BS, MS, DVM, of Mountainair New Mexico (P.O. Box 477, Mountainair, NM 87036).

I am the inventor of the K-9 KUMALONG and U.S. Patent Nos. 4,483,275, and 4,566,255. I am considered to be the originator of the canine training halter that encircles the canine snout.

I am familiar with the COMFORT TRAINER developed by Miriam Fields-Babineau.

During the development of the K-9 KUMALONG, I considered and then specifically rejected the use of metallic rings. I chose flexible "DOWNHOLE" rubber rings used in commercial drilling. Metal is not forgiving and will not conform to the canine head. Rubber rings are forgiving and will conform to the canine head. I was concerned that metal rings would cause nerve damage. The difference between rubber and metal rings is not an obvious substitution and represents a significant difference in design.

I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code; and that such willful false statements may jeopardize the validity of this application or any patent issuing thereon.

Respectfully submitted,

Date: 2/4/04

Alice De Groot DVM
ALICE DE GROOT, BS., MS., DVM

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:
Miriam Fields-Babineau :
Serial No.: 09/736,408 : Art Unit: 3644
Filed: December 15, 2000 : Examiner: Smith, Kimberly
For: COMFORT TRAINER : Atty Docket: 4523-001
("CANINE HEAD HALTER") : (MFB-0001)

DECLARATION UNDER 37 C.F.R. §1.132
ERIC UDLER, PRESIDENT, SUPER PET EXPO

Now comes Eric Udler, of Super Pet Expo of Rockville, MD (5824-A Hubbard Drive, Rockville, Maryland 20852). I am the president of Super Pet Expo, a nationally recognized pet trade show organizer.

I have had occasion to personally view the commercial success of the COMFORT TRAINER at the Super Pet Expo. The COMFORT TRAINER is embodied in the above-identified U.S. patent application serial no. 09/736,408, hereinafter ("COMFORT TRAINER"), and respectfully state as follows:

1. The COMFORT TRAINER has been successfully exhibited at a number of Super Pet Expo trade shows with commercial success.

2. The COMFORT TRAINER was successfully offered for sale at the most recent Super Pet Expo, April 6-7, 2002 in Chantilly, VA. At the April show, the COMFORT TRAINER was sold out of product.

I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code; and that such willful false statements may jeopardize the validity of this application or any patent issuing thereon.

Further Declarant sayeth naught.

Respectfully submitted,



ERIC UDLER, President
Super Pet Expo

Date: 9-12-2002

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